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No. 02-632

IN THE

Supreme Court of the United States

ZACHARIAH LOGIODICE,

Petitioner,

v.

TRUSTEES OF MAINE CENTRAL INSTITUTE, DOUGLAS C. CUMMINGS, JOHN MARQUIS, TERRANCE C. McCANNELL, and MAINE SCHOOL ADMINISTRATIVE DISTRICT NO. 53,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MAINE SCHOOL ADMINISTRATIVE DISTRICT NO. 53 AND TERRANCE C. McCANNELL

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STATEMENT OF THE CASE

Respondents Maine School Administrative District No. 53 ("MSAD 53") and its Superintendent Terrance McCannell ("McCannell") agree with Petitioner's Statement of the Case insofar as it sets forth facts pertinent to the decisions below and the issue presented by the pending petition, with two specific exceptions. Those exceptions are discussed below, *see infra* at 2, 4. MSAD 53 and McCannell add the following facts which were omitted by Petitioner.

I. Facts Related To Petitioner's Disciplinary Suspension

The discipline which is challenged by Petitioner was imposed solely by Respondents Maine Central Institute, Cummings, and Marquis ("MCI"), and neither of the MSAD 53 Respondents had any knowledge of the disciplinary action at the time it was taken. Neither of the MSAD 53 Respondents had any opportunity to participate in the decision regarding the imposition of the challenged discipline. The MSAD 53 Respondents learned, for the first time, of the disciplinary suspension on the ninth or tenth day of the suspension. Immediately upon learning of the disciplinary action, which included the possibility that the suspension would exceed a period of ten days, McCannell communicated to MCI that MCI was violating its contract with MSAD 53 and that MCI was infringing upon Petitioner's due process rights. MSAD 53 permitted the Petitioner's parents to attend the next regularly-scheduled school board meeting and supported the Petitioner and his parents at that meeting.

MSAD 53 itself could not have afforded Plaintiff a due process hearing within the confines of the original ten-day suspension: (1) because it was not aware of the suspension

until the ninth or tenth day; and (2) because such a hearing would have been nothing more than a "trial in absentia", MCI having previously declared that it would not honor any determination of MSAD 53 as it pertained to discipline imposed by MCI on MSAD 53 students attending MCI.

Petitioner asserts that "nothing in the contract addresses the establishment of any mechanism for protecting the due process rights of the District students who may be subjected to discipline by MCI". Petition at 4. MSAD 53 and McCannell contend that this assertion is not an accurate reflection of the record and therefore bring this issue to the attention of the Court. Supreme Court Rule 15(2). In point of fact, as discussed below, *infra* at 3, the contract between Respondents specifically required MCI to adhere to all legal requirements regarding the education of MSAD 53 students attending MCI.

II. Facts Related To The Relationship Between MCI And MSAD 53

A. Delegation of responsibility for providing educational services by MSAD 53 to MCI

MSAD 53 is the public school serving unit for the towns of Pittsfield, Burnham, and Detroit, Maine. MSAD 53 does not have its own high school. Pursuant to statute, 20-A M.R.S.A. § 2701, MSAD 53 contracts with MCI to provide educational services to MSAD 53's high school-aged youngsters. A series of contracts between MSAD 53 and MCI govern the relationship between those parties. Each contract contains a clause which delegates MSAD 53's educational responsibilities from MSAD 53 to MCI, and which governs the imposition of discipline on MSAD 53 youngsters attending MCI pursuant to the contracts.

The contract provided, in pertinent part:

> Maine Central Institute agrees to assume *all the legal requirements* of School Administrative District No. 53 for the education of tuition students in grades 9, 10, 11 and 12 with the exception as noted in Paragraph 6 of this agreement. The Trustees (MCI) shall have the sole right to promulgate, administer, and enforce all rules and regulations pertaining to student behavior and discipline. (emphasis added).

The term "education" includes all aspects of a youngster's participation in the educational environment, including discipline. Therefore, the contract requires that MCI abide by all laws pertaining to MSAD 53 regarding the discipline of MSAD 53 youngsters attending MCI.

B. Entwinement between MSAD 53 and MCI

Pursuant to 20-A M.R.S.A. § 2703(1)(B), there has at all times been a joint committee consisting of four representatives from Respondent MSAD 53 and four representatives from Respondent MCI. While the committee possesses the statutory authority to select and employ teachers for MCI, determine teachers' salaries, arrange the course of study, amend and enforce rules, etc., 20-A, M.R.S.A. § 2704(2), the committee has never exercised any of those powers. MSAD 53 does not control how MCI meets the academic requirements pertaining to the education of secondary school students. MSAD 53 pays tuition costs only for its own students. No MCI employees receive governmental benefits because of the fact that MCI educates MSAD 53's youngsters. No employees of Respondent MSAD 53 hold administrative positions at MCI.

Finally, Petitioner's representation that "members of MCI's faculty and staff are entitled to participate in the Maine State Retirement System", Petitioner's Petition at 3, is accurate but misleading. The right to participate in the Maine State Retirement System is unrelated to the existence of the contractual relationship between MSAD 53 and MCI. In point of fact, under certain circumstances, Maine statute permits private or parochial school teachers to participate in the Maine State Retirement plan. 5 M.R.S.A. § 17763.

REASONS FOR DENYING THE PETITION

The centerpiece of Petitioner's request for a writ of certiorari is that the circuit court incorrectly concluded that MCI, a nominally private actor, should be burdened with state actor status. The Petition does not set forth in concise fashion which considerations Petitioner believes warrant the exercise of the Court's discretion to grant the Petition. Supreme Court Rule 10. It appears from the Petition, however, that Petitioner urges both that the circuit court's decision in this case conflicts with relevant decisions of this Court, Petition at 8, and that the circuit court in this case has decided an important question of federal law that has not been fully settled by this Court. Petition at 8, 9. MSAD 53 and McCannell premise their opposition to the Petition on the belief that those are the considerations upon which Petitioner relies in his request for a writ of certiorari.

I. The Decisions Of The Lower Courts In This Case Do Not Conflict With This Court's Holdings In Either *West v. Atkins* Or *Brentwood Acad. v. Tenn. Secondary Sch. Ass'n.*

Because the circuit court correctly concluded that education is not a function exclusively performed by the state, it properly determined that the delegation of educational responsibility to MCI does not render MCI a state actor. The circuit court's holding that MCI is not a state actor such that liability may be fastened upon it under 42 U.S.C. § 1983 is not in conflict with this Court's prior decisions, because those decisions require that the function in question be both traditionally and exclusively reserved to the state. *Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978). Similarly, because the circuit court properly engaged in the fact intensive analysis required by *Brentwood Academy v. Tenn. Secondary Sch. Ass'n.*, 531 U.S. 288 (2001), its decision affirming the order of the district court is wholly consonant this Court's holding in *Brentwood*.

A. The circuit court's determination that MCI is not a state actor as a result of the public entities' delegation of responsibility for providing educational services does not conflict with this Court's holding in *West* because the provision of educational services has never been a function exclusively reserved to the state.

Petitioner urges that this Court's decision in *West v. Atkins*, 487 U.S. 42 (1988), compels the conclusion that MCI was a state actor because MSAD 53 students attend MCI in order to fulfill their state law obligation to attend school, and because attendance at MCI is the only manner in which

MSAD 53 students can receive the free public education guaranteed by state law. In this particular, Petitioner paints the circuit court's decision as conflicting with this Court's decision in *West*.

West provides no benefit to Petitioner, however, as the circuit court correctly recognized, because in order for the holding in *West* to adhere, the function in question (here, education) must be both traditionally and exclusively reserved to the state. *West v. Atkins*, 487 U.S. 42 (1988); *Flagg Bros. v. Brooks*, 439 U.S. 149, 158 (1978). The circuit court's determination on this issue was properly guided by the exclusivity requirement, App. A at 6a (located in Petition), in recognition of the fact that education has never been a function reserved exclusively to the state. *Id.*

This Court has consistently emphasized that a public function is exclusive only when it arises out of the authority and force of the government. This Court has found nominally private parties to be state actors where those parties used peremptory jury challenges in a discriminatory manner, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), used the judicial branch to obtain a property attachment, *Lugar v. Edmundson Oil Co.*, 457 U.S. 922 (1982), administered elections for public office, *Terry v. Adams*, 345 U.S. 461 (1953), governed a company town, *Marsh v. Alabama*, 326 U.S. 501 (1946), as well as provided medical care for state prisoners. *West v. Atkins*, 487 U.S. 42 (1988). In each of those cases, governmental authority was required before the private entity could act. The functions being performed by the private actors in those cases depended upon force and authority of government for their very existence.

Here, the circuit court recognized the plain difference between those cases where private actors are performing functions exclusively reserved unto the state and this case, where the private actor is performing a function which is sometimes performed by the state, other times performed by private actors, but which may be performed without the force or authority of government. For these reasons, the circuit court's decision does not conflict with decisions of this Court which have held, on contrasting facts, that private actors may be burdened with state actor status when performing functions that are exclusively within the province of the government.

B. The circuit court's decision does not conflict with this Court's decision in *Brentwood* because the circuit court employed the necessarily fact intensive analysis required by *Brentwood.*

Petitioner also challenges the circuit court's determination that there was insufficient entwinement between MSAD 53 and MCI to render MCI a state actor, and that the circuit court's decision in this case therefore conflicts with this Court's decision in *Brentwood.* The Petition does not assert that the circuit court failed to conduct its entwinement analysis under the *Brentwood* standard, but rather, suggests that the circuit court misapplied the standard. *See* Petition at 7, 8. Petitions for writs of certiorari are seldom granted on the basis of erroneous factual determinations or misapplication of properly stated rules of law. Supreme Court Rule 10.

The circuit court contrasted the relationship between the public and private entities in *Brentwood*, which blurred to the point of virtual confluence, with the distinction between MSAD 53 and MCI in this case. App. A, 8a-10a. The circuit

court found here that, notwithstanding some relationship between the entities, the imbrication of the two was insufficient to render MCI a state actor. *Id.* The circuit court found that MCI is run by private individuals and not public officials, that there was a joint committee which had the authority to exercise broad powers but never did so at all, and that the day-to-day operations of MCI, including discipline, are governed solely by MCI and not by public officials.

It is plain that the circuit court honored this Court's ruling in *Brentwood* both in terms of identifying the proper rule of law and in applying the facts of this case to that rule of law. As a consequence, the circuit court's decision is not in conflict with this Court's decision in *Brentwood* and should be left undisturbed.

II. There Is No Important Question Of Federal Law Which Requires Resolution By This Court.

A. The relevant federal question has been amply resolved by existing decisions.

Petitioner laments that this Court's decision in *Brentwood* did little to define the "state action" doctrine with respect to nominally private entities. Petition at 8. This Court has previously recognized the inherent difficulty in determining under what circumstances a private actor should be treated as a state actor for purposes of imposing liability for alleged constitutional transgressions. *See Brentwood*, 531 U.S. at 295-96; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Polk County v. Dodson*, 454 U.S. 312 (1981); *Evans v. Newton*, 382 U.S. 296 (1966); *Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715 (1961). Indeed, there appears to be some degree of overlay between the four exceptions developed by this Court to the state action requirement of 42 U.S.C. § 1983. For example, there is

no clear distinction between the "symbiotic relationship" test, *see Brentwood* at 930-34, and the "entwinement" test. Nevertheless, the fact that a legal doctrine is incapable of precise delineation through neatly ordered and rigid criteria does not render the issue unanswered for purposes of invoking this Court's discretionary jurisdiction.

Rather, the Court has recognized that with respect to the state actor doctrine, the issue is necessarily fact intensive and incapable of precise delineation. *Brentwood* at 295. It is difficult to imagine how the Court could provide further clarification in this area of the law that would be appreciably different than the guidance afforded by *Brentwood*, and that would substantially eliminate the admittedly difficult task encountered by lower courts in analyzing facts on a case by case basis consistent with the *Brentwood* guidelines.

B. The question raised by Petitioner is not "important".

Finally, not only is the federal question at issue already sufficiently answered, the record does not demonstrate that the question is an "important" one. While importance is admittedly a subjective consideration, it is at least generally dependent upon the number of persons, other than the parties, who may be affected by the questions presented. *See* Robert L. Stern, et al, *Supreme Court Practice*, § 6.31(b) (6th ed. 1986). Here, for the first time in the case, Petitioner represents that there are thousands of students in the New England area who attend private high schools through contractual arrangements with the students' public school districts. Even accepting without verification the accuracy of Petitioner's statistics in this particular, there is no indication that the difficulties encountered in this case exist in any of the other circumstances cited by Petitioners. For example, in the contractual arrangements in this

and other states referred to by Petitioner, there may be more specific provisions dealing with students' constitutional rights in the context of discipline and otherwise. Similarly, in some of the other states referenced by Petitioner (Vermont, Connecticut and New Hampshire), state statute may govern the relationship between the public and private schools and may contain provisions that address the concerns presented by Petitioner in the instant case. Petitioner's showing on the impact that this question has on others is gossamer at best, and falls far short of what is required to establish an important question warranting this Court's intervention.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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